90-739

(1)

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

CLARENCE E. CRAYTON, WILLIE MAE CRAYTON AND EDRICE C. RIVERS,

Petitioners

v.

PRICHARD HOUSING AUTHORITY, THE CITY OF PRICHARD, AND RICHARD COMPTON,

Respondents

Petition for Writ of Certiorari: to the United States Court of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Nathan P. Friedlander
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The question presented for review is as follows:

I. Whether an owner/landlord who applies for rent and rehabilitation subsidies under the Section 8 Moderate Rehab Program, in circumstances where benefits under the program are designed by the Housing Authority to be distributed on an objective ranking basis, has standing under 42 U.S.C. Sec. 1983 to assert due process and equal protection challenges to the arbitrary and capricious action of the Housing Authority in denying such benefits to the owner/landlord and awarding them to other parties when, were it not for such arbitrary and capricious action, the benefits would have been received.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

1. Counsel for Appellees, Michael Figures, Eugene Seidel and John Grisso;

2. Housing Authority of the City of Prichard, Charles Pharr and Richard Compton as Director of the United States Department of Housing and Urban Development;

3. Counsel for Appellants: Nathan P. Friedlander;

4. Appellants, Clarence E. Crayton, Willie Mae Crayton and Edrice C. Rivers;

5. Trial Judge:

Charles R. Butler, Jr., United States District Judge for the Southern District of Alabama.

NATHAN P. FRIEDLANDER

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TABLE OF AUTHORITIES

1. Black v. Beame,
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7. Roberts v. Secretary, Department of Housing and Urban Development,
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The opinion of the District Court for the Southern District of Alabama was not reported. The opinions of the Court of Appeals for the Eleventh Circuit were not reported.

The judgment of the Court of Appeals for the Eleventh Circuit was made and entered on the 30th day of April, 1990 and the denial of the Petition for Rehearing to the Court of Appeals for the Eleventh Circuit was made and entered on the 3rd day of August 1990 and copies thereof are appended to this petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) upon petition of the Plaintiffs in the District Court below.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Amendment XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. U.S.C. Sec. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress

applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. 28 U.S.C. Sec. 1343

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damage for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 43;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulations, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all

persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section --

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. 28 U.S.C. Sec. 2201(a)

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration

shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

These suits arise from the administration of the Section 8 Moderate Rehab Program by the Housing Authority of the City of Prichard in 1983. Under the factual scenario most favorable to the Plaintiffs which was presented to the District Court on motion for summary judgment, the Housing Authority of the City of Prichard (hereinafter "Housing Authority") solicited letters from interested persons, including Plaintiff Clarence Crayton, as part of its request for funding made in 1983 for funds under the Moderate Rehab Program. In the Spring of 1984 the Department of Housing and Urban Development ("HUD") allocated 150 moderate rehab units to the Housing Authority. The Housing Authority then began to solicit proposals from interested persons. The Plaintiffs, who own various units within a subdivision of the City of Prichard known as Prichard Homes, submitted applications for 89 units owned by them, acting in reliance on representations made to Clarence Crayton by the Housing Authority that the Prichard Homes area was targeted for moderate rehab funds and that the Plaintiffs' units were suitable for

inclusion under the program.

The Housing Authority received 450 applications from interested owners. It developed a ranking program to award its 150 unit allocation among these applicants. Approximately 200 units satisfied the threshold criteria for inclusion in the program and were ranked.

However Plaintiffs received a notice that the Housing Authority was, without ranking their properties, rejecting all applications for units located within Prichard Homes Subdivision on the basis that the Housing Authority had determined that the properties, as a group, did not meet certain health quality standards promulgated by HUD and applicable to Section 8 programs. Specifically the Housing Authority made a ruling, without notice or hearing, that the deteriorated state of the water and sewer lines in the area, coupled with the fact that such lines lay in the same trench, created a threat which violated certain Section 8 health quality standards. The Plaintiffs exhausted their administrative remedies in attempting to reverse this determination.

Other Section 8 programs, including the

regular Section 8 and Rental Rehab programs, were operated by the Housing Authority within the Prichard Homes Subdivision at the time. The same health quality standards relied on by the Housing Authority in rejecting the Plaintiffs' applications are applicable to these programs. If the Plaintiffs' applications had been ranked the Plaintiffs would have received 80% of the funding available. However due to the refusal of the Housing Authority to rank their applications or include properties located in the Prichard Homes Subdivision within the allocation the Plaintiffs received no units.

The Housing Authority also awarded a number of Moderate Rehab units to owners of properties in a subdivision known as Alabama Village. According to the superintendent of the Prichard Water and Sewer Board, the conditions relied on by the Housing Authority in rejecting the Plaintiffs' applications existed to the same or worse extent in the Alabama Village Subdivision as in the Prichard Homes Subdivision.

William Clarke is the Congressional Representative for the State Legislature from the

Prichard district. He is a former member of the Housing Authority Board of Commissioners and owns a realty business which does business with the Housing Authority. After the Plaintiffs' applications were rejected, despite no change in circumstances, Representative Clarke was awarded 4 moderate rehab units within the Prichard Homes Subdivision.

Plaintiffs Clarence Crayton and Willie Mae Crayton filed their original complaint in the Circuit Court of Mobile County claiming damages and injunctive relief against the Prichard Housing Authority, the City of Prichard and Richard Compton, Director of the Department of Housing and Urban Development. On June 22, 1987, the action was removed to the United States District Court for the Southern District of Alabama on the Petition of the Defendant Compton. Edrice Rivers was joined as a party Plaintiff on December 30, 1987.

The Plaintiffs' complaint is stated in four separate counts: (1) A federal claim for damages against the Prichard Housing Authority (hereinafter "PHA") on account of alleged arbitrary and discriminatory conduct in the administration of

benefits under the Section 8 Moderate Rehab Program; (2) A claim for declaratory judgment and injunctive relief against PHA and Richard Compton as Director of the Department of Housing and Urban Development (hereinafter "HUD") to determine whether the Defendants acted arbitrarily and in a discriminatory manner in administering benefits under the Section 8 Moderate Rehab Program and enjoining Defendants to either re-evaluate the Plaintiff's applications for inclusion in the program or provide alternative funding; (3) A pendant state claim for damages resulting from fraudulent conduct of Prichard Housing Authority; and (4) A pendant state claim for damages against the Prichard Housing Authority for subjecting Plaintiffs' properties to involuntarily servitude. (R-2-32)

A stipulation of dismissal was filed dismissing the City of Prichard without prejudice.

After discovery the remaining Defendants filed motions for summary judgment and Plaintiffs filed opposition thereto.

On April 5, 1989 the District Court the Honorable Charles Butler presiding, ordered summary

judgment in favor of the remaining Defendants.

Plaintiffs filed their notice of appeal on April 28, 1989.

The parties conducted oral argument before a panel of the Eleventh Circuit Court of Appeals on April 19th, 1990. On April 30th, 1990, the panel of the Eleventh Circuit affirmed the decision of the District Court without opinion, per curiam.

The Plaintiffs filed a petition for rehearing and suggestion of rehearing in banc on or about the 15th day of May, 1990. On August 3rd, 1990, the United States Court of Appeals for the Eleventh Circuit in a per curiam order denied the petition for rehearing and suggestion of rehearing in banc.

EXISTENCE OF JURISDICTION BELOW

The District Court for the United States District of the South District of Alabama had jurisdiction pursuant to 28 U.S.C. Sections 1331, 1343, and 2201(a).

ARGUMENT

The decisions of the Courts below should be reviewed because they erroneously rely on a line of cases holding that there is no private cause of action in an owner/landlord under the National Housing Act and therefore that the Plaintiffs had no claim under the instant factual situation. In fact the Plaintiffs have a cause of action and standing to challenge the conduct of the Defendants under the Fifth and Fourteenth Amendment to the United States Constitution as protected by 42 U.S.C. Sec. 1983. Allowing the decisions of the Courts below to stand deprive the Plaintiffs and other similarly situated applicants for benefits under Section 8 programs to be the victim of arbitrary and capricious dispensation of such valuable government benefits without redress.

Allowing the Housing Authority to deviate from the objective ranking system it developed for administering the Moderate Rehab in question so as to award units on a ad hoc basis to achieve its own politically motivated end not only denied the Plaintiffs due process but struck at the core of the democratic process. Hornsby v. Allen, 326 F.2d

505 (5th Cir. 1964). Allowing the Plaintiffs' grievances to go unresolved by-passes procedural safeguards upon systems of administration of governmental benefits which should be imposed. Black v. Beame, 419 F.Supp. 599 (S.Z.N.Y. 1976) citing Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Because of the threat to the democratic process arising from the allowance of such arbitrary, capricious and ad hoc administration of government programs such as occurred in the instant case, the issues raised by the Plaintiffs' petition for certiorari are of such exceptional importance so as to warrant review by certiorari. If private citizens such as the Plaintiffs are not allowed to assert such claims although they have been directly injured as a consequence, then who shall watch government agencies such as the Housing Authority of the City of Prichard?

The Plaintiffs submit that their due process and equal protection claims in the instant case are akin to those asserted by the Plaintiffs in Hornsby v. Allen, supra. In that case the Plaintiff, the insuccessful applicant for a license to operate a

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liquor store, brought an action under 28 U.S.C. Sec. 1343 and Sec. 2201 alleging a deprivation of civil rights and seeking declaratory judgment. The Plaintiff alleged that her application was denied without an adequate reason and that the action of the City Council which denied the application was arbitrary, capricious, discriminatory and in contravention of the due process and equal protection clauses of the Fourteenth Amendment. In reversing the District Court's grant of the Defendants' motion to dismiss, the Fifth Circuit ruled that the denial of the license, being based on a determination that the applicant had not satisfied certain qualifications and criteria was adjudicatory in nature and being a judicial act, was subject to the fundamental requirements of due process.

Plaintiffs in the instant case respectfully submit that the determination by the Housing Authority that an imminent health threat existed was likewise an adjudicatory determination and therefore the requirements of due process were applicable. Being adjudicatory, the decision making process of the housing authority was not

subject to unlimited discretion and is subject to being overruled if arbitrary and capricious. Housing Authority of Roosevelt City v. Nunn, 288 So.2d 775 (Ala. 1974); Southern Cooperative Development Fund v. Louis E. Driggers, 696 F.2d 1347 (11th Cir. 1983); Roberts v. Secretary, Department of Housing and Urban Development, 473 F.Supp. 52 (N.D.Miss. 1979).

Likewise the allowance of the Moderate Rehab program in Alabama Village and other Section 8 programs in Prichard Homes, including Representative Clarke's 4 moderate rehab units in Prichard Homes, evidenced a disparate treatment without valid justification which denied the Plaintiffs equal protection.

In the case of Southern Cooperative Development Fund v. Driggers, 696 F.2d 1347 (11th Cir. 1983), summary judgment in favor of the Plaintiffs was affirmed based upon a finding that a local zoning authority's refusal to grant Plaintiffs a preliminary subdivision plat was arbitrary and capricious and violated the Plaintiffs' rights to due process in violation of 42 U.S.C. Sec. 1983 and the Fourteenth Amendment to

the United States Constitution. In contravention of law the commission failed to give any reason for disapproving the plat. The Defendants contended that the Board's denial of the plat application was justified under the subdivision regulations in effect at the time the application was filed. However the record before the Court established that the Plaintiffs had complied with detailed and comprehensive subdivision regulations and that the Commission had no discretion to approve the plat. The conduct of the Commission was held to be administrative in nature and as the Defendants used ad hoc requirements in order to effectuate their purpose, their conduct was held to be arbitrary, capricious and a violation of the Plaintiffs due process rights.

Similarly in the instant case the Housing Authority acted inconsistently and in an ad hoc manner to achieve political ends rather than for the stated purpose of protecting potential Section 8 applicants against any imminent threat condition. The Plaintiffs' applications, if ranked, would have resulted in an award of units to the Plaintiffs. Instead the Housing Authority imposed inconsistent

and ad hoc restrictions, thereby depriving Plaintiffs of a valuable governmental benefit.

Although the particular facts underlying Hornsby, supra (alcoholic licensing) and Southern Cooperative, supra (subdivision zoning restrictions), may be distinguishable from the administration of Section 8 programs, the underlying principles of granting Fifth and Fourteenth Amendment due process protection are directly applicable to objective schemes of distributing government benefits. Because the per curiam decision deviates from these controlling authorities in banc consideration is warranted. Hulls v. New York City Housing Authority, 398 F.2d 262 (2nd Cir. 1968).

It is plain that arbitrary and capricious conduct was engaged in by the Housing Authority to achieve an ad hoc end for the Authority's own benefit. Otherwise how can it be explained that if the condition relied on by the Housing Authority in rejecting the Plaintiffs' applications for the inclusion of units in Prichard Homes Subdivision existed to the same or worse condition in the Alabama Village Subdivision that: (1)

Representative Clarke was awarded units in Prichard Homes; (2) other Section 8 programs were operated in Prichard Homes concurrently with the rejection of the Plaintiffs' applications; and (3) Moderate Rehab and other Section 8 programs were operated in Alabama Village.

Basic to the Plaintiffs' claim is the concept that the process by which the Housing Authority was to award Moderate Rehab funds was, if operated properly, an objective one rather than discretionary. Assuming the Plaintiffs' properties satisfied the threshold criteria for eligibility, then the rank of the properties according to the program standards would determine whether or not Plaintiffs received funding.

In this respect the instant case is distinguishable from the decisions relied on by the District Court holding no due process rights exist where a tenant making application to a landlord or government official with discretion is denied Section 8 assistance. See, e.g., Black v. Beame, 419 F.Supp. 599 (S.D.N.Y. 1976) (in absence of clear right to government benefits federal courts should not second guess state officials'

discretionary decisions on allocation of limited public welfare funds among myriad recipients); Eidson v. Pierce, 745 F.2d 453 (7th Cir. 1984) (applicant for Section 8 rental assistance has no legitimate claim of entitlement to receipt of Section 8 benefits in absence of decision making criteria capable of being explored at due process hearing).

CONCLUSION

Because the Plaintiffs suffered injury in fact they have been damaged and have the right to make claims under 42 U.S.C. Sec. 1983 and 28 U.S.C. Sec. 1343; Hulls v. New York City Housing Authority, 398 F.2d 262 (2nd Cir. 1968). Plaintiffs are further entitled to a declaratory judgment under 28 U.S.C. Sec. 2201. The sole remaining avenue for the Plaintiffs to seek constitutional redress of their injuries is by petition for certiorari to this Court. Therefore it is respectfully submitted that this petition is due to be granted and upon conclusion of the proceedings that the judgments of the District Court of the Southern District of Alabama and the United States Court of Appeals for the Eleventh Circuit are due to be reversed and the

cause remanded for further proceedings in the District Court.

Nathan P. Friedlander

CERTIFICATE OF SERVICE

I, Nathan P. Friedlander, do hereby certify that I served a copy of the Petition for Writ of Certiorari on the 19th day of October, 1990, and on the 8th day of November served a corrected copy on Michael Figures, 2317 St. Stephens Road, Mobile, Alabama 36617, Eugene Seidel, Asst. U.S. Attorney, Federal Courthouse, Mobile, Alabama 36602, John Grisso, U.S. Department of Housing and Urban Development, Room 676, Richard B. Russell Federal Building, 75 Spring Street, S.W., Atlanta, GA 30303-3388 and the Solicitor General, Department of Justice, Washington, D.C. 20530 by depositing the same in the United States mail, properly addressed and first class postage prepaid and Joseph Spaniol, Clerk, United States Supreme Court, 1 First Street, N.E., Washington D.C. 20543 by certified mail, properly addressed and first class postage prepaid.

Nathan P. Friedlander

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CLARENCE E. CRAYTON WILLIE MAE CRAYTON and EDRICE C. RIVERS, Plaintiffs, v. THE PRICHARD HOUSING AUTHORITY, THE CITY OF PRICHARD and RICHARD COMPTON, as Director of Housing and Urban Development, Defendants.	)	CIVIL ACTION NO. 87-0576-B

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law entered this day, it is hereby ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of defendants.

DONE this the 5th day of April, 1989.

Charles R. Butler, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-7375

D.C. DOCKET NO. 87-0576-B

CLARENCE E. CRAYTON,
WILLIE MAE CRAYTON,
EDRICE RIVERS,

Plaintiffs-Appellants,

versus

THE PRICHARD HOUSING AUTHORITY,
THE CITY OF PRICHARD,
JACK KEMP, DIRECTOR OF HOUSING
& URBAN DEVELOPMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

(April 30, 1990)

Before ANDERSON and EDMONDSON, Circuit Judges,
and GODBOLD, Senior Circuit Judge

PER CURIAM:

AFFIRMED. See Circuit Rule 36-1.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-7375

CLARENCE E. CRAYTON,
WILLIE MAE CRAYTON,
EDRICE RIVERS,

Plaintiffs-Appellants,

versus

THE PRICHARD HOUSING AUTHORITY,
THE CITY OF PRICHARD,
JACK KEMP, DIRECTOR OF HOUSING
& URBAN DEVELOPMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion April 30, 1990, 11 Cir. 198_, ___ F.2d ___).

Aug. 3, 1990

Before ANDERSON and EDMONDSON, Circuit Judges, and GOLDBOLD, Senior Circuit Judge.

PER CURIAM:

(✓ The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and

the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

J. L. Edmondson
United States Circuit Judge

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CLARENCE E. CRAYTON, WILLIE MAE CRAYTON and EDRICE C. RIVERS,	)	CIVIL ACTION NO.
Plaintiffs,	)	87-0576-B
v.	)	
THE PRICHARD HOUSING AUTHORITY, THE CITY OF PRICHARD and RICHARD COMPTON, as Director of Housing and Urban Development,	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is before the Court for consideration of the motions of the defendants, Housing Authority of the City of Prichard and Richard Compton as Director of Housing and Urban Development, for summary judgment. The Court, having carefully considered the motions, the briefs, the exhibits, and the applicable law, finds and concludes as follows:

Findings of Act

1. Plaintiffs Clarence E. Crayton and Willie

Mae Crayton filed this action on May 12, 1987, in the Circuit Court of Mobile County, Alabama. On June 22, 1987, the United States of America, on behalf of its agency, The United States Department of Housing and Urban Development (HUD), filed a petition in the United States District Court of the Southern District of Alabama, Southern Division, petitioning the Court to remove the case from the Circuit Court of Mobile County to this Court. Subsequent to removal, Edrice Rivers was joined as a plaintiff in the action.

2. (A) Count One of plaintiffs' complaint alleges that their applications [proposals] for funding for their rental units under the Section 8 Moderate Rehabilitation Housing Program were arbitrarily and capriciously denied by defendant Housing Authority of the City of Prichard (Housing Authority), which administers the program under a contract with HUD. The complaint cites no specific constitutional provision, statute, rule or regulation that is alleged to have been

violated.

(B) Plaintiffs allege in Court Two of the complaint that the actions of the Housing Authority in denying their applications [proposals] constitute inverse condemnation of their property and resulted in an involuntarily servitude being placed upon it in contravention of the Constitution of the State of Alabama. The complaint cites no specific provision of the Alabama Constitution that was contravened.

(C) Count Three of plaintiffs' complaint alleges that the actions of the Housing Authority violated due process rights of plaintiffs under the Fifth and Fourteenth Amendments to the United States Constitution and also under 42 USC Sec. 1983.

3. The Housing Authority is a corporation formed under the laws of the State of Alabama. It is administered by a five member Board of Commissioners appointed by the Mayor of the City of Prichard. Charles Pharr is the Executive

Director of the Authority.

4. The Housing Authority administers a program known as the Section 8 Moderate Rehabilitation Program, which is funded by HUD. The program was created by Congress in 1978 by amendment to the United States Housing Act of 1937 and is designed to achieve three major objectives:

a. To upgrade substandard housing and provide rental subsidy to low and moderate income to families.

b. To preserve and revitalize Community Development Areas with special priority given to properties located in the City of Prichard to compliment development efforts in these neighborhoods.

c. To provide improved living conditions for low and moderate income families while maintaining their housing costs at an affordable level.

42 U.S.C. Sec. 1437f(e) (2).

The regulations which implement this program are outlined at 24 C.F.R. 882, subpart E.

5. Pursuant to its Administrative Plan, adopted in accordance with applicable regulations,

the Housing Authority solicited proposals from owners of rental property in the City of Prichard through a Public Notice/Request for proposals in the spring of 1984 for participation in the Moderate Rehabilitation Program. One hundred fifty rental units were allotted to the Housing Authority for placement in the program by HUD.

6. Proposals were submitted on approximately 450 units and each owner who responded to the solicitation for proposals was provided an Owner's Packet. In each packet was information which stated the required contents of the owner's proposals and gave a general description of the criteria to be used by the Housing Authority in evaluating, ranking, and selecting eligible proposals. The criteria encompassed environmental requirements and health conditions, including specifications for water and sewage service to the proposed properties.

7. Owners selected to participate in the Section 8 Moderate Rehabilitation Program enter

into a contract with the Housing Authority, whereby the Housing Authority guarantees lease payments to the owners on behalf of eligible tenants who reside in their rental units for a fifteen year period.

8. During the months of November and December, 1984, the plaintiffs submitted proposals to place approximately 89 rental units owned by them under the Moderate Rehabilitation Program. All of the units proposed by the plaintiffs were in a subdivision located in the City of Prichard known as the Prichard Homes Subdivision.

9. There existed in the Prichard Homes area at all times pertinent to this lawsuit an imminent health threat to the health and safety of persons residing there resulting from standing sewage and the infiltration of raw sewage into water lines because water and sewer lines ran through the same trench.

10. The Housing Authority notified the plaintiffs and all other applicants from the

Prichard Homes area by certified mail dated May 13, 1985, that their proposals were not accepted due to the unsanitary conditions affecting the properties in that area. The Housing Authority advised in that letter that it was not "accepting properties located in the Prichard Homes area, as it has been determined that existing conditions violate program regulations and pose a threat to the health and safety of residents." The letter also told plaintiffs that the Housing Authority and federal and state agencies were proposing comprehensive redevelopment of the area.

11. On or about the 21st day of May, 1985, plaintiffs Clarence Crayton and Edrice Rivers requested a hearing before the Board of Commissioners of the Housing Authority concerning the decision not to accept their proposals.

12. On June 6, 1985, plaintiff Clarence Crayton, on behalf of himself, Willie Mae Crayton, and Edrice Rivers, appeared before the Board of Commissioners requesting reconsideration of the

rejection of their proposals. In addition to making an oral presentation, Mr. Crayton offered reasons in writing as to why the proposals should be accepted for participation in the Moderate Rehabilitation Program.

13. By letter dated June 28, 1985, Charles Pharr, Executive Director of the Housing Authority, notified plaintiffs Clarence Crayton and Edrice Rivers that the Board of Commissioners had decided to uphold its initial decision to not accept the proposals submitted by the plaintiffs.

14. In addition to the reasons presented at the June 6, 1985 meeting, Clarence Crayton felt that after the Housing Authority determined that it could not fund proposals in the Prichard Homes Subdivision, it should have cancelled the process altogether and allowed him to submit proposals on other properties owned by him in Prichard that may have been eligible for the program. He felt that the entire process should have been started over even though there were more than enough units

submitted in other qualifying proposals to meet the Housing Authority's entire 150 unit allocation.

15. As opposed to believing that the Housing Authority had no basis at all for its decision, plaintiffs do not agree with the Housing Authority's reasons for rejecting proposals in the Prichard Homes Subdivision and do not believe that the reasons given were true.

CONCLUSIONS OF LAW

I. The "Arbitrary and Capricious" Claim

1. In Roberts v. Secretary, Department of Housing and Urban Development, 473 F.Supp. 52 (N.D.Miss. 1979), the court held that for a decision to be "arbitrary and capricious," it "must be based on facts not supported by the record; however, factual certainty is not necessary, and an agency may regulate even though facts do not illustrate a clear path." Id. at 59 (citing National Citizens Commission for Broadcasting v. F.C.C., 555 F.2d 938 (D.C. Cir.

1977) (aff'd in part and reversed on other grounds, 436 U.S. 775 (1978)).

2. Under the "arbitrary and capricious" standard of review, the reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," and it cannot "substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). See also Colonial Fast Freight Lines v. United States, 443 F.Supp. 73 (N.D. Alabama S.D. 1977) and American Federation of Government Employees v. Hoffman, 427 F.Supp. 1048 (N.D. Ala. 1976). Further, in determining whether the relevant factors have been considered by the agency, the court may consider only a basis articulated by that agency in its order as supporting authority for that order. Burlington Truck Lines v. United States, 371 U.S. 156 (1962); Securities Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947). The Roberts

court stated that "it is not for the reviewing court to supply its own interpretation so long as the interpretation or determination applied by the agency was reasonable, even though that interpretation might not appear as reasonable as some others." Roberts, 473 F.Supp. at 54.

3. The Housing Authority did not accept plaintiffs' proposals, nor those of other owners, to place properties owned by them located in the Prichard HOmes Subdivision in the Moderate Rehabilitation Program of the city of Prichard because it determined that water and sewage conditions in the area violated program regulations and posed a threat to the health and safety of the residents, and because a comprehensive redevelopment plan was proposed to improve existing conditions in the area, which included the correction of the water and sewer problem.

4. Based on the conclusions set forth in paragraphs one through three, this Court is

unwilling to substitute its judgment for that of the Housing Authority and concludes that the actions of the defendant Housing Authority of the City Prichard were reasonable and were not arbitrary and capricious, and that said defendant is entitled to judgment as a matter of law on this issue.

II

II. No Private Right of Action

5. In Cedar-Riverside Associates, Inc. v. Minneapolis, 606 F.2d 254 (8th Cir. 1979), the Eighth Circuit Court of Appeals addressed the question of whether plaintiffs have a right of action enforceable in Federal Court under the National Housing Act. In this case, private developers brought suit against the city housing redevelopment authority, the city, and other defendants in connection with an urban development housing project. An appeal was taken after the District Court dismissed four claims.

6. The Court of Appeals held that the

complaint, alleging that the defendants breached their statutory obligation to comply with the national housing policy established in the National Housing Act of 1937 (claiming that the failure to follow established housing policy interfered with their contractual relations), failed to state a claim upon which relief could be granted, since the National Housing Act did not create a private cause of action for violation of such statutory obligation. The Court of Appeals, upholding the District Court, stated the following, equally applicable to the instant case:

> "...we determine first that appellants do not belong to a class for whose special benefit Congress enacted the Housing Act. If Congress intended the Housing Act to benefit any particular class of persons, that class must be the inhabitants of inadequate housing, not private developers of housing projects." Id., p. 257.

7. See also Guran Co. v. Akron, 546 F.2d 201, 204 (6th Cir. 1976). Both of these cases, as

well as those discussed below, demonstrate that the plaintiffs do not have a private right of action to maintain this action, and that the lawsuit must be dismissed.

III. Lack of Standing

8. In order for the plaintiffs to have a federally protected property right to participate in the MOderate Rehabilitation Program under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. 1983, plaintiffs must have a "legitimate claim of entitlement" to such participation which must be "more than an an abstract need or desire for [a government benefit] ... more than a unilateral expectation of it." Board of Regents v. Roth, 408 U.S. 564, 577 (1970).

9. The purpose of the National Housing Act of 1937 is to provide housing for low-income persons. 42 U.S.C. Sec. 1437. In Moses v. Banco Mortgage Co., 778 F.2d 267 (5th Cir. 1985), the court held that owners of low income housing

projects or investors in them do not have a right to participate in HUD programs under the National Housing Act (42 U.S.C. Secs. 1437, et. seq.) or HUD regulations, because neither the Act nor the regulations were designed to benefit them. The District Court had entered summary judgment in favor of the defendants and, on appeal, the Court of Appeals held that neither owners of low-income properties not bidders at a HUD mortgage auction had standing to maintain a legal action challenging the award of a mortgage bid to Banco Mortgage Company:

> "We hold that neither the Federal Housing Act nor the HUD regulations was intended directly to benefit either owners of low income housing projects or parties bidding at the HUD mortgage auction. Since any benefit that Moses may have received as a result of the statute or regulation was unintentional or incidental, we hold that Moses lacks standing to brings Counts I and II of his complaint."

Id., p. 271. Rather, the persons within the "zone of interests" to be protected by the Act and the

regulations are low-income tenants who require housing. See also Guran Co. v. Akron, 546 F.2d 201 (6th Cir. 1976) (citing Cort v. Ash, 422 U.S. 66 (1975)).

10. Not even low-income persons rejected as tenants have standing under the Federal Housing Act or HUD regulations. In Eidson v. Pierce, 745 F.2d 453 (7th Cir. 1984), the court stated that "Section 8 is ... not a simple entitlement program" such as a public welfare benefit program of the type that was the subject of the landmark decision in Goldberg v. Kelly, 397 U.S. 254 (1970). "In Goldberg," as the Eidson court notes, "and numerous other public benefit cases, the law established eligibility criteria, and any person who satisfied those factual criteria were entitled to the benefits." Id. at 461.

11. In contrast, the court held that plaintiffs, potential Section 8 tenants, did not have a "legitimate claim of entitlement" to housing even though they were eligible for it,

concluding that entitlement came into being only after a private owner accepted their applications as tenants. The court noted that owners could not be compelled to accept all applicants because the regulations specifically gave the owners the authority to choose from those persons they expected to be responsible tenants, stating that the "Section 8 Program does not constrain the owner's judgment on that question" Id.

12. The court further concluded that there is nothing in the Section 8 law to suggest that Congress intended for potential tenants to have enforceable rights to section housing in particular projects, even though the Section 8 Program is designed for low income tenants who meet basic eligibility criteria. Id. at 462 ("Section 8 entitlements depend on discretionary judgments which, in some respects, are not constrained by any legal criteria.").

13. This Court concludes that the administration of the Section 8 Moderate

Rehabilitation Program is placed by HUD in public housing authorities, such as defendant Housing Authority of the City of Prichard, to administer within their sound discretion and judgment subject only to the broad guidelines, standards and regulations promulgated by HUD.

14. In selecting the Owners to participate, the Housing Authority used the standards promulgated by HUD, which were made known to owners submitting proposals. Among these standards were the consideration of the environmental requirements and health conditions specifically with respect to the condition of the water and sewage servicing the properties proposed. Upon discovering the existence of the problem in the Prichard Homes area and learning of efforts to correct it and redevelop the area by the Prichard Water and Sewer System and the City of Prichard, the Housing Authority opted to join those efforts rather than invest monies in a fifteen year project there.

15. The Court thus concludes that plaintiffs cannot properly raise due process claims because they do not have a property interest and have no right that is enforceable in this Court. Moses v. Banco Mortgage Co., 778 F.2d 267 (5th Cir. 1985); Eidson v. Pierce, 744 F.2d 453 (7th Cir. 1984). They may have an expectancy, a need, or desire, but do not have a "legitimate claim of entitlement." Roth, 408 U.S. at 577. A person has no right to a valuable governmental benefit and the government can deny him the benefit for any number of reasons that do not infringe on a constitutionally protected right. Perry v. Sinderman, 408 U.S. 593 (1972). The reasons used by the Housing Authority of the City of Prichard were completely valid, as were all of the actions undertaken in connection with plaintiffs' proposals and in the distribution of Moderate Rehabilitation funds. Those reasons would have been sufficient even if plaintiffs had a constitutionally protected property right to

participate in the Moderate Rehabilitation Program.

IV. Inverse Condemnation

16. The Supreme Court of Alabama, in Ex Parte Carter, 395 So.2d 65 (Ala. 1980), stated:

> [A]n action claiming inverse condemnation is very limited and ... all elements must be present. Inverse condemnation in defined as the taking of private property for public use without formal condemnation proceedings and without just compensation being paid by a governmental agency or entity which has the right or power of condemnation.

Id. at 67.

17. The Carter court further stated:

> A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, can never pass by implication. When the power is granted, the extent of its exercise is limited to the express terms or clear implication of the statute in which the grant is contained."

Id. (citing City of Birmingham v. Brown, 241 Ala.

203, 207; 2 So.2d 305, (1941)) (emphasis supplied).

18. This Court concludes that although the Housing Authority does have the power of eminent domain pursuant to section 24-1-28 of the Code of Alabama (1975), it has not taken any of the property belonging to the plaintiffs. Therefore, no inverse condemnation of plaintiffs' property has occurred.

19. For all of the foregoing factual findings and legal conclusions, the Court finds that there is no genuine issue as to any material fact and concludes that the defendants are entitled to judgment as a matter of law on all issues.

It is so ORDERED.

DONE this the 5th day of April, 1989.

Charles B. Butler, Jr.
UNITED STATES DISTRICT JUDGE